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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1950

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment of the Supreme Court of Ohio be dismissed on the ground that it does not present a substantial federal question.

STATEMENT

This case concerns an order of the Court below suspending appellant from the practice of law in Ohio for an indefinite period for personally soliciting the personal injury claims of Carol McClintock and Wanda Lou Holbert of Chardon, Ohio, in violation of DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility.

The facts in this case are set forth in the opinion of the Court below. (Jurisdictional Statement p. 1a) Because there is a wide divergence between "relevant facts" found by the Court below and those set forth at pages 5-9 of appellant's Jurisdictional Statement we set forth in full the findings of fact by the Court below.

> "Albert Ohralik, respondent, was admitted to the practice of law in Ohio in March 1948. He is 55 years old and resides in Montville, Ohio. His law office is in Cleveland.
>
> "Relator, Ohio State Bar Association, filed a complaint with the Board of Commissioners on Grievances and Discipline against Albert Ohralik, alleging that he solicited the personal injury cases of Carol McClintock and Wanda Lou Holbert in violation of Dr 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility.
>
> "Most of the material events involved in this complaint occurred on or about February 13, 1974. In the early morning of that day, while at the Montville, Ohio, Post Office, respondent learned from the postmaster's brother that Carol McClintock, of Montville, and Wanda Lou Holbert, of Chardon, had been involved in a serious automobile accident. Neither Carol McClintock nor Wanda Lou Holbert were relatives or former clients of respondent. Both were, if anything, casual acquaintances. Upon learning of the accident, which had occurred on February 2, 1974, respondent telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment for the injuries sustained in the accident.
>
> "Carol McClintock testified that, until respondent visited her in the hospital on February 13th, she did not know that he was a lawyer. She admitted to a casual acquaintanceship with him,

> which began with her visits to the Montville Post Office to pick up the family mail, and which was limited to a customary exchange of greetings on such occasions. She also knew that her father had purchased an automobile from respondent a number of years ago. Disputing this testimony, respondent insisted that Carol must have been aware that he was a practicing lawyer because, among other things, he had been a candidate for a political office and the fact was evident from his campaign literature.
>
> "After reviewing with Carol the legal merits of her cause and the need for proper representation, respondent obtained Carol's consent to handle the claim. Leaving the hospital, respondent drove to the home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock.
>
> "Wanda Lou was then 18 years of age. Respondent, upon being admitted to her home, advised Wanda that he represented Carol McClintock, and that he had a "tip" for her, namely: that she had a substantial legal claim for the injuries she had suffered while riding as a passenger in the automobile driven by her neighborhood friend, Carol. He further informed her he was prepared to supply her with the legal services necessary to capitalize on her claim. Respondent's representations induced Wanda to orally agree to engage him as her attorney in the matter.
>
> "The following day, February 14, 1974, respondent telephoned Wanda Lou for purposes of firming the client-attorney relationship begun the preceding day. The phone was answered by Wanda Lou's mother, who unceremoniously advised him that his services were not desired. Respondent retorted by pointing out that it was not she but

Wanda Lou, a competent consenting adult, who was his client.

"Respondent, in support of his claim that a binding agreement to engage his services had been made with Wanda Lou, introduced in evidence a tape recording of the February 13, 1974, conversation with Wanda Lou. The recording was made on respondent's recorder, hidden at the time of recording under respondent's coat, and made without the knowledge of Wanda Lou. Some of the recorded conversation indicates a consent by Wanda Lou to the utilization of respondent's professional services, but the conversation also demonstrates that this consent was induced and solicited by respondent.

"Thereafter, both Carol and Wanda attempted to disengage respondent's services. Wanda's attempt began immediately, and Carol's some time after February 1974. Respondent insisted he had a valid binding agreement with both, which he was determined would be performed. Respondent sued Carol McClintock on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,166.66. He testified that, as to Wanda Lou Holbert, he will abandon his claim against her because of his belief that under the disciplinary rules an ethical question arises 'if a contract has its origin in a controversy.'

"Respondent's answer to the complaint denied violation of the above disciplinary rules and moved to dismiss the complaint, contending that the above provisions of the Code of Professional Responsibility are unconstitutional for repugnancy to the free-speech provision of the First Amendment to the United States Constitution.

"After hearings on November 24, 1975, and January 29, 1976, the board found that the respondent did, in fact, solicit the personal injury cases of Carol McClintock, and Wanda Lou Holbert, in

violation of DR 2-103(A) and DR 2-104(A), Code of Professional Responsibility.

"The board found respondent's defense, that the solitication of business by an attorney is protected by the First and Fourteenth Amendments to the United States Constitution, to be without merit and overruled respondent's motion to dismiss.

"Although not objecting to the findings of fact of the board, respondent renewed his motion to dismiss these proceedings on the ground that DR 2-103(A) and DR 2-104(A) are unconstitutional for the reason that they deprive respondent of free speech as guaranteed by the United States and Ohio Constitutions.

"This court overruled respondent's renewed motion to dismiss."

ARGUMENT

This court has held that rights under the Fourteenth Amendment to the U. S. Constitution were not violated by a state statute which made it a criminal offense for any person by personal solicitation to seek employment to prosecute or collect claims, including unliquidated claims for personal injuries. *McCloskey v. Tobin* (1920) 252 U. S. 107, 64 L. Ed. 481, 40 Sup. Ct. 531. The court said at page 107-109 "the evil against which regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. (citations omitted) Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable. (citation omitted) The statute is not open to the objections urged against it."

This court recognized in *Cohen v. Hurley* 366 U. S. 117-124, 6 L. Ed. 2d 156-162 (overruled on other

grounds, *Spevack v. Klein* 385 U. S. 511) in the majority and dissenting opinions (p. 174 fn 34) that

> "History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. (ambulance chasing) That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigation long established, but the subject matter of the present investigation does not lack rational basis. It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with sufficient devotion to duties which a lawyer owes to the court, or that the 'payment of awards to persons to bring in legal business' is inconsistent with the personally disinterested position a lawyer should maintain."

Appellant asserts that he has a First Amendment right to personally solicit his legal employment, and, in support of that proposition he relies on the decisions of this court in *N.A.A.C.P. v. Button* (1963) 371 U. S. 415, and, *United Mine Workers v. Illinois State Bar Association* (1967) 389 U. S. 217. (Jurisdictional Statement p. 10)

However, absent from these cases is any indication of motive of pecuniary gain or the possible compromise

of ethical standards on the part of the attorneys involved. In fact, rather than supporting the conclusion that rules against solicitation constitute violations of the First and Fourteenth Amendments, the cases cited by Appellant provide some indication of this court's concern for the dangers of solicitation of legal representation for private gain.

Mr. Justice Brennan, speaking for the majority in N.A.A.C.P., supra, placed considerable emphasis upon the lack of desire for pecuniary gain or circumstances creating a danger of conflict of interest in that case, stating (371 U. S. pp. 441-443)

> "Objection to the intervention of a law intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain. Fearfully of dangers thought to arise from the element, the courts of several states have substantial regulations aimed at these activities. (fn omitted) We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally guaranteed civil rights. (fn omitted) There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of N.A.A.C.P. have not been shown to conflict with those of its

> members and nonmembers Negro litigants. * * *. Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular."

In *United Mine Workers v. Illinois State Bar Association*, supra, the court held that freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gave the United Mine Workers Union the right to employ an attorney on a salary basis to assist its members in the assertion of their legal rights 389 U. S. at pp. 221-222. The Court, however, noting that the Union had engaged in this practice since 1913, carefully examined the arrangement for any possibility that the attorney might be tempted, because of his dependence upon the Union for his economic welfare, to sacrifice the clients best interests (389 U. S. p. 224) and found that the prohibition of practices such as that engaged in by the United Mine Workers Union was "not needed to protect the State's interest in high standards of legal ethics." (U. S. 389, p. 225.)

Unlike the cases upon which appellant relies, it is clear from the findings of fact of the Court below that Appellant solicited his professional employment for personal gain. An examination of the findings of fact of the court below reveals misconduct which by any definition of propriety and fair play is offensive. Observe that Appellant secretly tape recorded his conversation with Wanda Lou Holbert by hiding his tape recorder under his coat. (Jurisdictional Statement pp. 8 and 3a) Also, that Appellant "testified that as to

Wanda Lou Holbert, he will abandon his claim against her because of his belief that under the disciplinary rules an ethical question arises 'if a contract has its origin in a controversy.'" Yet, four days after Appellant testified, as above, he sued Wanda Lou Holbert in the Chardon Municipal Court, Geauga County, Ohio, for $2,466.66, claiming a contract of employment.

The grief which Appellant has brought upon his two young clients (18 years of age when he solicited them) demonstrate the vital concern of the Court below in maintaining standards of professional conduct to protect the public from personal solicitation of legal employment. This compelling state interest has been acknowledged by this court in *Goldfarb v. Virginia State Bar*, (1975) 421 U. S. 773, 792-93, 95 S. Ct. 2004, 2016.

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as a part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Board of Dental Examiners*, 294 U. S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L. Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See *Sperry v. Florida*, 373 U. S. 379, 383, 83 S. Ct. 1322, 1325, 10 L. Ed. 2d 428 (1963); *Cohen v. Hurley*, 366 U. S. 117, 123-124, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156 (1962); *Law Students*

Research Council v. Wadmand, 401 U. S. 154, 157, 91 S. Ct. 720, 723, 27 L. Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions."

CONCLUSION

For the foregoing reasons it is respectfully submitted this appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Motion to Dismiss has been mailed by first class mail with postage prepaid to Eugene Gressman, Counsel for Appellant, 1828 L. Street N.W., Washington, D.C. 20036.

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